Supreme Court of the United States

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OCTOBER TERM, 1904.

No. 102.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, ET AL.,
Defendants.

BRIEF OF DEFENDANTS.

John J. Browne and Anna W. Browne; Jennie McKenzie and James McKenzie; Northwestern and Pacific Hypotheekbank; Isaac Kaufman, Claribel Kaufman and Equitable Trust Company; Joseph B. Goodner and Sallie Goodner; Covert August and Pauline August.

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This action is not in ejectment. It is in equity praying decree quieting title and for permanent injunction. It is against many parties having nothing in common. The property described in bill is an alleged right-of-way, several miles

in length. The prayer of the bill shows nature of action (p. 8 of Transcript.)

HAS THIS COURT ACQUIRED JURISDICTION?

The Railroad Company invoked the jurisdiction of the state court and brought its bill therein. Being defeated in both the lower and appellate courts it has sued out a writ of error to this court. Its theory is that an interpretation of the act of congress incorporating its predecessor is necessarily involved. As a matter of fact the State Supreme Court did not base its decision upon any interpretation of this federal statute, but upon an entirely independent ground.

In its opinion that court said (p. 130 of Record):

> "It will be observed that this case does not involve in any manner a construction of the act of congress incorporating the Northern Pacific Railroad Company, or the granting to the company of its right-of-way. Neither is this action against the company as many of the actions are which are cited by the appellant. There is no attempt here to bind the company by an *ultra vires* agreement, but the attempt is on the part of the company to repudiate executed contracts and rights which have grown up through the laches, negligence and direct agreements of the company. Neither is this an action where the court has attempted to determine how much of the right-of-way was necessary for the railway company to use in operating its road."

Also (p. 131):

> "If the doctrine of estoppel can ever be invoked it seems to us that it should be invoked in this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. If the rights of the government are in any way involved or jeopardized by the possession of these lands by the defendants, the government may act in the premises unaided by the appellant whose negligence and laches have been the cause of these investments by the defendants. The appellant should not be allowed to escape the consequences of its own wrongful acts and reap a fraudulent benefit by pleading the rights of the government."

The concluding words of the opinion are (p. 135 of Record):

> "In consideration of all the circumstances surrounding this case and of the underlying principles governing rights and remedies, we are of the opinion that the judgment should be affirmed."

It had been held in an early day, as in this cause, that an action of this kind is equitable in character.

> *Smith v. Wingard,* 3 Washington Territory Rep., 398.

And the Railroad Company was necessarily familiar with this doctrine when this action was brought.

The question involved herein was passed upon by this court in *De Saussure v. Gaillard,* 127 U. S., 216. The court said:

> "It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.' *Klinger v. Missouri,* 13 Wall., 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided, under section 709 of the Revised Statutes, that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Later, and in *Seeberger v. McCormick,* 175 U. S., 128, this court said:

> "It has been frequently held that the contention, even if formally made, that plaintiffs in error were seeking

to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give us jurisdiction to review the judgment of the Supreme Court of a state where that judgment was based upon a doctrine of general law sufficient of itself to determine the case. *Beaupre v. Noyes,* 138 U. S., 397, 39 L. ed., 991, 11 Sup. Ct. Rep., 296; *Eustis v. Bolles,* 150 U. S., 361, 37 L. ed., 1111, 14 Sup. Ct. Rep., 131; *Pierce v. Somerset R. Co.,* 171 U. S., 641, 43 L. ed., 316, 19 Sup. Ct. Rep., 64; *Remington Paper Co. v. Watson,* 173 U. S., 443, 43 L. ed., 762, 19 Sup. Ct. Rep., 456."

We submit that this court is without jurisdiction and that the writ of error should be dismissed.

ON THE MERITS.

We shall take up the cases of the different defendants separately. There are some material differences in the facts. It by no means follows that the plaintiff in error is entitled to a reversal of this case as to any of the defendants under the doctrine laid down in the case of *Northern Pacific Railroad Company v. Townsend,* 23 Sup. Ct. Rep., 671. We do, however, first respectfully contend that the rule adopted in that case is erroneous and should not be followed.

That case went up from the Supreme Court of Minnesota where it was decided July 12, 1901, 84 Minn., 152. The case at bar was decided by the Supreme Court of Washington

June 29, 1901, 25 Wash., 384. The Railroad Company sued out a writ of error in the Minnesota case at once and allowed the Washington case to stand until the decision of this court had been rendered in the former case. The object of this conduct was manifestly to establish a precedent in a cause that presented the fewest problems. In the court's opinion in the *Townsend* case is a quoted statement made in the *Smith* case, 171 U. S., 261:

> "By granting a right-of-way four hundred feet in width Congress must be understood to have conclusively determined that a strip of that width was necessary for public work of such importance."

That statement was wholly unnecessary in the decision of the *Smith* case. It was mere dictum. Now is it a fact that Congress intended to decide that when the railroad should be constructed along the bank of mountain streams, as necessarily it would be so constructed, a four hundred foot right-of-way was conclusively necessary? Or when it should pass through the Bad Lands of Dakota or across a rolling prairie, or through farm lands? Congress should not be accused of such lack of judgment. Did Congress mean to hamper the Railroad Company by compelling it to maintain, preserve, care for or pay taxes on a right-of-way that was useless? Did it mean to thus destroy large quantities of valuable tillable land and thus injure the settler, and the public, and the Government without any benefit to the corporation? Rather did not Congress mean that the Railroad Company should be given a right-of-way of unusual width so as to meet every

emergency, leaving to it the right to abandon or alien such parts thereof as it should not desire to use? Is not this the reasonable and sensible construction thereof? Such at least is the construction that has been from the beginning put thereon by the Railroad Company itself; by the public generally; by the state courts and by the Government through the Secretary of the Interior. This will be referred to more fully hereinafter.

This court also, in its opinion in the *Townsend* case, said:

> "As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to review the cases which have been called to our attention, supporting on the one hand or denying on the other, the broad contention that title by adverse possession under state statutes of limitations may be acquired by individuals to land within the right-of-way of a railroad. *None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case.*" (Italics are ours.)

We respectfully submit that this statement is not accurate and that the question is a material one.

Is there any difference as to the interest of the Railroad Company in or the powers it has concerning right-of-way

lands granted under section 2 of the act of Congress of July 2, 1864 (13 Statutes at Large, 365; being the act incorporating the Northern Pacific Railroad Company), and the right-of way acquired under section 7 of the same act? Section 7 authorizes condemnation proceedings to acquire right-of-way. Manifestly Congress did not intend there should be any difference or distinction. Now each state has an eminent domain statute. Railroad companies have acquired thousands of miles of rights-of-way under such statutes. Much of the right-of-way of the Northern Pacific Railroad Company, at least of the branch lines, has been acquired under state statutes of eminent domain. As to other transcontinental railroads some of their right-of-way has been acquired under special acts of Congress or the general act of March 3, 1875, 18 Statutes at Large, 482, and some under the state eminent domain statutes. There is no material difference in the language of these statutes as to the interest acquired in the land by the railroad company or its power over it.

The object and purpose of all these statutes is the same. The consideration given the nation or the state for the power of eminent domain is future service to the nation, the state, the people. Any difference as to details do not affect the principle. There should be uniformity in the law as to the questions involved. As to the Northern Pacific, the Union Pacific, the Great Northern, or any other railroad, must it be the law that it may lose through abandonment or adverse possession unused portions of its right-of-way when such right-of-way was acquired under the state statute, but it may

not when such right-of-way was acquired under some special or general act of Congress?

Is this question one of such vital importance that this court is called upon to differ with all the state courts, no matter what the results may be? Especially when the railroad companies and the public have for more than twenty years given these statutes a different construction and great hardship might follow from such doctrine. (See facts set forth at page 125 of Record as to platting and deeding part of right-of-way by Northern Pacific in City of Spokane and the building of blocks thereon.)

The Government, through the Secretary of the Interior, took a position directly the opposite of the decision of this court in the *Townsend* case in a letter to Congress concerning a ratification act passed, which we will hereafter more particularly refer to.

The statement quoted as to the decisions of the state courts is, we conceive, not correct.

In *Pittsburg C. C. & St. Ry. Co. v. Stickley,* 155 Ind., 312, the court said:

> "But there is no reason why a railroad company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, *if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to re-acquire the land by purchase or condemnation.* * * *

The State confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the State should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents."

That a railroad company may lose by abandonment or adverse possession unused portions of its right-of-way has been held in Illinois by several decisions.

Railroad v. Houghton, 126 Ill., 233.
Railroad v. O'Connor, 154 Ill., 550.
Railroad v. Moore, 160 Ill., 9.
Railroad v. Donohue, 165 Ill., 640.
Railroad v. Wakefield, 173 Ill., 564.

Also in other states:

Matthews v. Lake Shore R. R., 110 Mich., 170.
Turner v. Fitchburg R. R., 145 Mass., 143.
Gay v. Boston A. R. Co., 141 Mass., 407
Paxton v. Yazoo & M. V. R. R., 76 Miss., 536.
Spottswood v. Morris E. R. Co., 61 N. J. Law, 322.
Townsend v. N. P. R. R. Co., 84 Minn., 152.

Also in England and Canada:

Bobbitt v. Railway Co., 9 Q. B. Div., 424.
Newton v. Railway Co., 13 Ch. Div., 268.
Rosseau v. Railway Co., 17 Ont. App., 483.

This is the unanimous doctrine of the state courts, except California, and the question referred to was not considered

in the opinion. The executive officers of the Government have conceded the power of the Northern Pacific to dispose of parts of its right-of-way. It did make such disposition to *bona fide* purchasers more than twenty years ago. Valuable permanent improvements have been made thereon in good faith. To lay down a different rule than that adopted by the Government, by the people, by the railroads, by all the state courts, is to produce inconsistencies and absurdities, destroy uniformity and work great hardships. No good can result therefrom while manifest injuries follow.

We submit this court should reconsider the doctrine enunciated in the *Townsend* case, and adopt the rule laid down in the state courts very tersely stated by the Indiana court.

AS TO DEFENDANTS BROWNE.

We contend that notwithstanding the decision of this court in the *Townsend* case, even though the rule therein adopted should be followed, the plaintiff in error is not entitled to a reversal of the judgment below for the reasons hereinafter stated.

(A) The first sentence in the opinion in the *Townsend* case is:

> "At the outset we premise that as the grant of the right-of-way, the filing of the map of definite location and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right-of-

way therein was taken out of the category of public lands subject to pre-emption and sale, and the department was, therefore, without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right-of-way because of the fact that the grant to them was of the full legal subdivisions."

The facts in the case at bar are contrary to those stated in above quotation. The map of definite location of the railroad, so far as the land in question is concerned, was not filed until October 4, 1880 (p. 112 of Record). Browne settled upon this land April 15, 1879. It was then unsurveyed. He duly made pre-emption entry under such settlement in January, 1881. He made payment of purchase price to the Government in 1882, and obtained patent without reservations or conditions (p. 123 of Record). That his title related back to the date of settlement cannot, of course, be controverted. Such is the statute and numerous decisions of this court. Browne paid for the full acreage and the Government conveyed the same without reservations. The railroad right-of-way was, before the map of definite location was filed, a mere "float." It was not intended by Congress that every man who should settle upon any land in the great northwest between 1864 and the time that the Railroad Company should see fit to file a map of definite location, made such settlement subject to having a part of his home taken away from him without compensation. The Northern Pacific act was passed in 1864. The map of definite location at this

point was not filed until seventeen years thereafter. The Government intended to keep faith with *bona fide* settlers. The Railroad Company was given the right of condemnation in such cases by section 7 of the act. This was a just provision. The principles established in the case of *Northern Pacific Railroad Company v. Nelson,* 188 U. S., 108, are applicable to the case at bar. Browne's title antidates and is paramount to any claim that might be made by the Railroad Company.

This fact was recognized and acted upon by the Railroad Company and Browne. In 1881 the Railroad Company platted part of section nineteen (19) in the City of Spokane under the name of "Railroad Addition." This was but a year after the original townsite was platted. The Railroad Company thus platted a part of its right-of-way in that section and sold the lots so platted. It designated upon its plat the right-of-way to be used as such as "Railroad Street," giving it a width of 229 feet. The Railroad Company entered into an agreement with Browne as to the character of this platting and as well as to the platting that should be done by him of the land in question under the name of Browne's Addition, and it was in accordance with such agreement that Browne divided into lots, blocks and streets all of the land pre-empted by him, leaving a strip 200 feet in width to correspond with "Railroad Street" in Railroad Addition, (which adjoined his land on the east), and Browne likewise designated upon his plat such strip as "Railroad Street." The Railroad Company has never been in possesion of any other

part of Browne's land except "Railroad Street," and the tracks were laid and are still maintained in the center thereof (pp. 124-5 of Record). At the time the railroad was built and ever since until the commencement of this action, Browne's title to all of this land was conceded by the Railroad Company, except this two hundred foot strip that he had dedicated to and for the use of the Railroad Company. It is under this dedication and agreement that the Northern Pacific gets its title to the two hundred foot right-of-way. We submit that Browne's title is paramount as to all of said land except the two hundred foot strip:

(1) Under the principles adopted in the Nelson case.

(2) Under the contemporary construction of the law and the facts adopted by the parties more than twenty years ago.

(3) Under the agreement of settlement of any question there might be over their respective rights made at the time the railroad was built.

(B) Under another well settled principle, the plaintiff cannot now recover this land. *Browne was placed in exclusive possession of all of this right-of-way except the ample two hundred foot strip called "Railroad Street" by the Railroad Company through its contracts and by its acts at the time the road was built.* If such agreements and such acts were *ultra vires* they cannot now maintain an action to recover such possession. This court said in *St. Louis V. I. H. R. Co. v. Terre Haute & T. R. Co.*, 145 U. S., 393:

"In the case at bar the contract by which the plaintiff

conveyed its railroad and franchise to the defendant for a term of 999 years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state and the duties which it owed to the public to another corporation which it knew had no legal capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its corporate powers it is certainly in no better position. In either aspect of the case the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract in view of the laws of which both parties were bound to take notice was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years, and has taken no steps to rescind or repudiate the contract. Upon this state of facts, for the reasons above stated, the plaintiff considered as a party to the unlawful contract has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by *laches*. * * * The case is not like those in which the defendant having abandoned or refused to perform the

> unlawful contract, has been held liable to the plaintiff as upon an applied contract for the value of what it had received from him and had no right to retain. * * * But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands."

The case at bar is in equity, although, as stated in the above decision, the rule would not be different if it were at law.

> *Northern Pacific R. R. Co. v. Ely*, 25 Wash., 384.
> *Smith v. Wingard*, 3 Wash. Ter. Reps., 298.

(C) As stated above, the Northern Pacific Railroad Company had from the beginning taken a different position concerning its power to alienate what it deemed to be useless parts of its right-of-way than that stated in the *Townsend* case, and the position taken by the Railroad Company had been concurred in by the Government, by the public and by the state courts. As a result thereof large expenditures have been made by private individuals in permanent improvements on parts of this four hundred foot strip. At the last session of Congress a validating bill was introduced. That bill was referred to the Secretary of the Interior and he made a report to the committee of the House of Representatives, to which the bill was referred, stating that the bill was useless because the Railroad Company had the power to alienate such parts

of its right-of-way as it deemed to be useless, and that such power had always been recognized by the Government. The Secretary of the Interior at the time of writing this letter, was evidently unfamiliar with the *Townsend* case. He stated, however, the theretofore settled policy of the Government, and the rule that had been adopted and in force ever since 1864 under which valuable property rights had been supposedly obtained by private citizens and large expenditures of money made. Upon the Secretary of the Interior being advised of the *Townsend* case he withdrew his objections to the passage of the validating act and such act was passed, entitled:

> "An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company,"

and the same was approved April 28, 1904. Such act, without preamble, provides:

> "That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right-of-way of the Northern Pacific Railroad granted by the Government by any act of Congress, are hereby legalized, validated and confirmed; provided, that no such conveyance shall have effect to diminish said right-of-way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained."

Also,

> "That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing accepting its terms and provisions."

Such instrument in writing accepting the terms and provisions of the act was promptly filed with the Secretary of the Interior by the Railway Company.

It was said by this court in *United States v. Chaves*, 159 U. S., 452:

> "Without going at length into the subject it may be safely said that by the weight of authority as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years and that such rule will be applied as a *presumptio juris et de jure* wherever by possibility a right may be acquired in any manner known to the law."

It is also said by this court in *Toltec Ranch Company v. Cook*, 191 U. S., 522, decided December 21, 1903, that

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

This validating act was passed after this decision was rendered and presumptively with knowledge of the language

quoted. We contend that if Browne's claim rested merely on adverse possession, such possession being considered *as tantamount to a conveyance* the question raised by the Railroad Company is eliminated by the act of Congress above mentioned. Browne's claim, however, is not based merely upon adverse possession, but it is an admitted fact, and so stated in the bill of exceptions, that Browne's platting of the land in question, his possession thereof from the beginning, his payment of taxes thereon, and his construction of valuable improvements thereon, were all in pursuance of a contract entered into with the Railroad Company before and at the time of the building of the road itself under which the company conceded to him such land and gave to him exclusive possession thereof and undertook to abandon all interest therein. *Such contract and such conduct would constitute a conveyance in equity and certainly comes within the language of the recent act of Congress and the intent thereof.*

AS TO DEFENDANTS McKENZIE.

Point "A" discussed above under the sub-head as to defendants Browne applies here also. The defendants McKenzie derived their title from Henry T. Cowley, who filed upon the land in question as a homestead on May 12, 1879, and obtained a patent therefor from the Government, which patent contained no exceptions or reservation or mention of the right-of-way (p. 122 of Record). The map of definite location of the right-of-way was filed in October, 1880 (p. 112 of Record).

Point "B" is also applicable so far as the question of *laches* is concerned.

Point "C" is also applicable except that a small part of the land in question is within one hundred feet of the railroad tracks.

AS TO DEFENDANT NORTHWESTERN AND PACIFIC HYPOTHEEKBANK.

Point "A," referred to in the Browne case, is equally applicable as to this defendant. Its title was derived from Henry T. Cowley, who entered upon this land as a homestead on May 12, 1879, and thereafter obtained a patent from the Government without exception or reservation.

The question of *laches* is likewise applicable.

Point "C" is equally applicable. *All* the land in question as to this defendant is distant more than one hundred feet from the railroad tracks (p. 118 of Record).

AS TO DEFENDANTS KAUFMAN AND EQUITABLE TRUST COMPANY.

The title of these defendants is obtained from the same source as the last two defendants named, to-wit: Mr. Cowley, and the position of these defendants is identical with that of the defendants McKenzie (p. 120 of Record).

AS TO DEFENDANTS GOODNER.

The bill of exceptions states (p. 116 of Record) that these

defendants took up the land in question as a homestead, making final proof on November 16, 1883, and obtaining a patent on August 21, 1884, under said homestead entry. It, therefore, follows that they settled upon the land prior to the filing of the map of definite location of the railroad. A part of the land in question is within one hundred feet from the railroad tracks and a part without.

The point of *laches* is also applicable in this case.

Respectfully submitted,

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